Supreme Court, U.S.
FILED
JAN 10 1997
OFFICE OF THE CLERK

No. 95-2074

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P. F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. (1992) 6

The American Bar Association ("ABA") respectfully submits this brief *amicus curiae* in support of Respondents pursuant to Rule 37.3 of the Rules of the Supreme Court. Consent to the filing of this brief has been granted by counsel for all parties *via* a stipulation previously lodged with the Clerk and a letter of consent from the United States filed simultaneously herewith.

INTEREST OF *AMICUS CURIAE*

The ABA, with more than 350,000 members across the United States, is the leading national membership organization of the legal profession. Its members include prosecutors, public defenders, attorneys in private practice, federal and state trial and appellate judges, legislators, law professors and students, and non-lawyer associates in related fields. Many ABA members, as well as the Association itself, have an interest in this case because the Religious Freedom Restoration Act ("RFRA") is a critically important legal tool for protecting religious liberty. In addition, the decision in this case could have a far-reaching impact on the ability of lawyers to help individuals protect their civil rights and civil liberties pursuant to a wide array of federal statutes passed through Congress' exercise of the same constitutional authority used to enact RFRA.

The ABA's strong support of RFRA derives from its long-standing commitment to the preservation of First Amendment freedoms, including religious liberty. After RFRA initially was proposed in 1990, the ABA adopted a policy supporting enactment of legislation that would require federal and State governments to "demonstrate that any law interfering with the free exercise of religion is (1) essential to furthering a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." The ABA's policy rests on the conviction that only by limiting governmental interference with the exercise of religion to those instances where government can demonstrate an urgent need

to do so can we protect the principles of religious liberty and tolerance on which this country was founded and for which it is unequalled elsewhere in the world. The ABA concluded that the compelling interest test is also the most practical means for ensuring that smaller and unpopular faiths receive the same level of protection as mainstream faiths. RFRA, as enacted in 1993, is consistent with the ABA's policy.

The ABA's interest in this case is based further upon the fact that RFRA is being challenged on grounds that implicate numerous other ABA policies supporting federal legislation enacted pursuant to Section 5 of the Fourteenth Amendment. If the challenge to congressional authority to adopt such legislation is successful in this case, it could cast doubt on the validity of voting rights provisions; statutory prohibitions against race, sex, age, and disability discrimination in housing, employment, education, and public accommodations, including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972; and numerous other laws designed to enhance the protection of individual rights.

Because of the ABA's longstanding involvement in these areas, and the broad spectrum of practice areas and interests of the national ABA membership supporting ABA policies that might be affected by the Court's decision in this case, the ABA has a special perspective to provide as *amicus curiae*.[1]

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[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act preserves and advances the principles of religious liberty and tolerance on which this nation was founded. The statute is an appropriate exercise of Congress' authority to enhance the protection of individual rights by prohibiting neutral rules with discriminatory effects where the judicial branch has declined to prohibit such rules. It also is carefully framed to protect a core constitutional right without impairing legitimate state interests or violating the Establishment Clause.

RFRA is a recent example of Congress' well established authority under the Constitution to protect individual rights. Prior to enacting RFRA, Congress employed its power under Section 5 of the Fourteenth Amendment to enact laws protecting a wide array of rights, including free speech and the free exercise of religion, and to protect against discrimination based on race, religion, gender, disability and age. This Court repeatedly has recognized Congress' power to enact such protective laws in situations where the Court has construed the Constitution as not requiring judicial protection.

It is vital that the Court continue to recognize Congress' power to protect individual rights under Section 5. A departure from this Court's long established precedent regarding Congress' Section 5 power would undermine a pillar of the American legal system and jeopardize a large number of statutes that have become integrated into the fabric of the law. This Court should affirm Congress' power to protect individual liberties through enactment of RFRA and similar statutes based on Congress' Section 5 power.

ARGUMENT

A bedrock principle of American government is that Congress, as well as the courts, has responsibilities for protecting individual rights. The cornerstone of this principle historically has been found in Section 5 of the Fourteenth Amendment. RFRA, which Congress enacted to protect and enhance individual religious liberty, is the latest example of Congress' appropriate use of its Section 5 power. In a series of historic statutes, Congress has protected individuals from discrimination based upon race, gender, religion, disability, and age and has promoted free speech and the free exercise of religion. Indeed, the civil rights advances of the last thirty years are in large part the result of Congress' appropriate and effective use of its authority. Protection of individual rights through Congress' Section 5 power now has become a fundamental part of American jurisprudence.

The statute, its legislative history, and this Court's precedents all provide ample demonstration of RFRA's constitutionality. Recognizing that the briefs of Respondents and other *amici* discuss these issues extensively, this brief first addresses only a few key elements of the constitutional challenges to the statute itself. It then discusses the possible ramifications of the decision in this case for other statutes that enhance the protection of important individual rights.

I. THE RELIGIOUS FREEDOM RESTORATION ACT IS WITHIN THE CONSTITUTIONAL AUTHORITY OF CONGRESS

The Religious Freedom Restoration Act clearly is a proper exercise of Congress' power to enforce the Civil War Amendments. *First*, RFRA protects the performance of religiously motivated acts, a goal that is within the scope of the First Amendment. *See Employment Division v. Smith*, 494

U.S. 872, 877 (1990) ("the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532-33 (1993) ("if the object of a law is to infringe upon or restrict practices because of their religious motivation . . . it is invalid unless justified by a compelling interest"). RFRA does not begin to test the outer boundaries of Congress' Section 5 power because this Court always has recognized that freedom to engage in religious practices is a fundamental constitutional right.

Second, it was appropriate for Congress to strike a balance in RFRA in favor of individual rights that is different from what the Court established in *Smith*. In *Smith*, the Court expressed concern about the dangers of "deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order" and reasoned that a host of laws protecting health, property, safety, or any other legitimate state interest could be suspended if the compelling state interest test were to be applied to neutral rules of general applicability. *Smith*, 494 U.S. at 888. The Court had expressed a similar concern in *Washington v. Davis*, 426 U.S. 229 (1976):

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white.

Id. at 248. Yet in *Davis* the Court recognized that even if judicial enforcement of a disproportionate impact rule is not appropriate, congressional enforcement would be wholly appropriate: "[E]xtension of the rule beyond those areas where it is already applicable by reason of statute, such as the field of public employment, should await legislative prescription." *Id.*

When Congress enacted RFRA, it was aware of the concerns raised by the Court in *Smith*; Congress heard testimony regarding the potential effects of the proposed legislation and weighed the societal benefits and burdens that might be posed by the statute. *See generally Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992). On balance, Congress determined that the societal benefits of imposing the compelling state interest test outweighed the costs. The Court traditionally has deferred to congressional decisions that such costs are acceptable in order to protect individual rights. The Court's analysis in *Davis* demonstrates that Congress acts within its proper role, as defined by separation of powers principles, when it prohibits neutral rules that the courts have not disallowed.

Third, the standard adopted by Congress in RFRA is mindful of state interests. Numerous lower courts applying RFRA have recognized that strict scrutiny is not "fatal" to every government action to which it is applied, *Adarand Constructors v. Pena*, 115 S.Ct. 2097, 2117 (1995), and have

upheld many governmental actions challenged under RFRA.[2] Indeed, it is very much an open question whether the municipal zoning law here at issue substantially burdens a person's religious conduct, whether the City will be able to demonstrate a compelling aesthetic and historical interest, and whether there is a less restrictive means of achieving its interest.[3]

Finally, RFRA broadly disavows any construction of its terms to violate the Establishment Clause, *see* 42 U.S.C. § 2000bb-4 (1994), and does not upset the balance this Court has struck in interpreting the Religion Clauses. Within the framework of the well established three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court's decisions "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2492 (1994).

For example, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987), this Court upheld Section

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[2] *See, e.g., Daytona Rescue Mission, v. Daytona Beach*, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (municipal zoning regulations prohibiting homeless shelters and food bank programs without special use permit not a substantial burden and city had compelling interest); *Thiry v. Carlson*, 78 F.3d 1491, 1495-96 (10th Cir. 1996) (condemnation of gravesite not a substantial burden), *cert. denied*, 117 S. Ct. 78 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1522-23 (11th Cir. 1995) (Freedom of Access to Clinic Entrances Act not a substantial burden on protestors' free exercise of religion).

[3] The ABA takes no position on these or other issues that go to the ultimate merits of the underlying claim.

702 of Title VII, which exempts religious institutions from Title VII's prohibition of religious discrimination in employment, and stated: "the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." The Court in *Amos* held that the first prong of the *Lemon* test, requiring laws to serve secular purposes, "does not mean that the law's purpose must be unrelated to religion." *Id.* at 335. Rather, the Court emphasized that avoiding interference with religious exercise is a permissible legislative purpose. Avoiding such interference is exactly the purpose of RFRA.

Nor does RFRA have the principal or primary effect of advancing religion. As with the statutory exemption in *Amos*, "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." *Id.* at 337. RFRA lifts many regulations that burden religious exercise and no objective observer surveying the "text, legislative history, and implementation of the statute" could conclude that RFRA endorses religion. *See id.* at 348 (O'Connor, J., concurring in the judgment). Finally, RFRA does not entangle government and religion any more than the Court's current application of the compelling interest test in cases involving governmental classifications based on religion. *See Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (compelling state interest test applies to governmental classifications based on religion).

II. THE AMERICAN LEGAL SYSTEM RELIES ON CONGRESS' POWER TO PROTECT INDIVIDUAL RIGHTS

Nothing less than the current allocation of power among the branches of government and the authority of Congress to protect individual rights is at stake in this case. The Court long has recognized Congress' authority under Section 5 of the Fourteenth Amendment to protect individual liberties. Relying on this Court's precedents, Congress has enacted a wide variety of statutes protecting individual liberties. The American people also have come to rely on these federal statutes to prohibit discrimination and encourage toleration in many aspects of civic life, especially in their relationship with government.

A departure from precedent in this area would create enormous uncertainty in a settled area of constitutional law.[4] If RFRA is invalidated, a wide range of federal civil rights statutes could be called into question. At the very least, RFRA's demise would result in immediate challenges across the Nation to Title VII's disparate impact provision as applied to religious exercise and to the Americans with Disabilities Act, *see infra*, thereby unsettling important reliance interests. For example, government employees who have relied on federal law for twenty-five years to require accommodations for their religious exercise (rules regulating clothing and workdays, for example), could well find themselves facing a choice between continued employment and fidelity to their religious practices.

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[4] Already, some federal statutes that enhance the protection of individual rights have been challenged because *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (limiting commerce power), has focussed attention on Congress' Section 5 authority.

In enacting RFRA, Congress did what it has done many times before: enhanced the protection of individual rights under its power to enforce the Civil War Amendments in situations where the Court has construed the scope of constitutional protection more narrowly. This Court has upheld the validity of such statutes in cases involving voting rights, equal protection rights, and incorporated constitutional rights.

A. Voting Rights

In a series of voting rights cases, the Court has upheld statutes that prohibit literacy tests and other facially neutral practices that have discriminatory effects. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court upheld a provision of the Voting Rights Act of 1965 that temporarily suspended literacy tests in States or political subdivisions with less than fifty percent voter registration, even though the Court in *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), specifically had declined to prohibit States from conditioning the suffrage right on literacy tests. *South Carolina v. Katzenbach* held that the power to enforce the Civil War Amendments enables Congress to prohibit a state action the Court previously had upheld as constitutional.

The Court subsequently applied *South Carolina v. Katzenbach*, a Fifteenth Amendment case, to hold that under Section 5 of the Fourteenth Amendment Congress may extend the ban on literacy tests. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding provision of Voting Rights Act prohibiting use of literacy test as condition of voting for persons who had completed sixth grade in Puerto Rican schools); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding extension of ban on literacy tests to whole country). The federal statutes prohibiting literacy tests are very similar to

RFRA: in both situations Congress has prohibited neutral rules that have the effect of discriminating even though the Court had previously upheld the facially neutral rules.[5]

Petitioner invites this Court to overturn the "substantive power" holding of *Katzenbach v. Morgan*. *See* Pet. Brief at 41. This request is unnecessary. RFRA protects a right that is textually grounded and forcefully protected under this Court's precedents against intentional religious discrimination. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532-33 (1993). Congress has not created a new right out of whole cloth; rather, it has employed a familiar tool--the compelling interest test--for rooting out discrimination that it deems is likely to result from a neutral rule. The precedent for such congressional action was established before *Katzenbach v. Morgan* in *South Carolina v. Katzenbach* and since has been reaffirmed.

For example, in *City of Rome v. United States*, 446 U.S. 156 (1980), the Court held that Congress could prohibit changes in electoral schemes with discriminatory effects even as it held, the same day, in *Mobile v. Bolden*, 446 U.S. 55 (1980), that such schemes do not, of themselves, violate the Fifteenth Amendment. *City of Rome* also made clear that

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[5] It has been suggested that the ban on literacy tests differs from RFRA in that Congress has enhanced the standard applied to free exercise cases in RFRA, whereas the ban on literacy tests applied the Court's Fifteenth Amendment standard but reached a different result from the Court in concluding that literacy tests should be prohibited. *See* Pet. Brief at 33. This attempted distinction is incorrect. By prohibiting literacy tests, Congress enhanced the legal standard applied to literacy tests as an abridgement of voting rights from a very lenient standard requiring a demonstration that the test was being used for discriminatory purposes, *see Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), to a *per se* rule of invalidity.

Congress' enforcement powers under the Fourteenth and Fifteenth Amendment are coextensive: the Court decided the case on Fifteenth Amendment grounds while relying on Fourteenth Amendment cases. *See City of Rome*, 446 U.S. at 176-77; *see also id.* at 207 n.1 ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive.") (Rehnquist, J., dissenting on other grounds). Thus, it is well established in the voting rights context that Congress may enhance the protection of constitutional rights by prohibiting neutral rules that have discriminatory effects.[6]

B. Equal Protection Rights

Beyond the voting rights context, Congress frequently has employed its power under Section 5 of the Fourteenth Amendment to enact numerous statutes that enforce a variety of other equal protection rights. These statutes show that Congress plays an important role in determining which classes of people merit greater protection against arbitrary discrimination and in devising appropriate remedies. Moreover, these statutes show that Congress already has protected religious exercise as an equal protection right.

In 1972, Congress employed its Section 5 power to extend Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, to apply to the States.

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[6] In other race-related areas, the Court repeatedly has upheld federal statutes that enhance the protection of individual rights as valid exercises of Congress' Thirteenth Amendment power. *See Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968); *Ex Parte Virginia*, 100 U.S. 339 (1879). The Thirteenth Amendment enforcement power is coextensive with the other Civil War Amendment enforcement powers. *See Fullilove v. Klutznick*, 448 U.S. 448, 500-01 (1980) (Powell, J., concurring) (treating all three enforcement powers as coextensive).

See Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) ("[t]here is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment"). The 1972 Amendments are significant here for three reasons. First, Congress effectively elevated gender as a protected class before this Court had done so. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (elevating scrutiny) (plurality); *Craig v. Boren*, 429 U.S. 190 (1976) (same). This Court upheld the 1972 amendments as a valid Section 5 measure in *Fitzpatrick*, a case alleging gender discrimination by a State, thus recognizing Congress' role in enhancing the protection for a class of persons. Second, Title VII's prohibition of religious discrimination applies to the States under the 1972 amendments, demonstrating Congress' Section 5 power to protect the free exercise of religion. Third, the disparate impact provision of Title VII, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 42 U.S.C. § 2000e-2(k) (1994) (codifying disparate impact law as part of Civil Rights Act of 1991), prohibits neutral rules with discriminatory effects even though the Court held in *Washington v. Davis*, 426 U.S. 229 (1976), that government employment rules violate the Equal Protection Clause only when a discriminatory purpose is proved.[7] The disparate impact provision of Title VII is nearly identical to RFRA in its prohibition of neutral rules that infringe upon free exercise.

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[7] In *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court held that disparate impact claims under Title VII may be pursued against a State. Although the Court did not address Congress' power in *Teal*, no member of the Court questioned Congress' power to prohibit the States from enforcing neutral employment rules with discriminatory effects in spite of *Davis*.

Congress again prohibited religious discrimination in Title IX of the Education Amendments of 1972, which prohibits public colleges from discriminating on the basis of "race, color, religion, sex or national origin." *See* 42 U.S.C. § 2000c-6 (1994). Title IX is based in part on Congress' Section 5 power. *See* 42 U.S.C. § 2000d-7 (1994) (amending Title IX and other statutes under Congress' Section 5 power so as to abrogate the States' Eleventh Amendment immunity); *Franklin v. Gwinnett County Public Sch.*, 112 S. Ct. 1028, 1038 n.8 (1992) (damages remedy is available under Title IX whether the statute was enacted under the spending power or Section 5 power). Although Title IX does not prohibit neutral rules that unintentionally discriminate, should RFRA be invalidated on the basis that Congress cannot play a role in determining which classes merit equal protection legislation, Title IX could be challenged. *See, e.g., Doe v. University of Illinois*, Civ. No. 96-1129 (C.D. Ill. 1996) (holding that *Seminole Indian Tribe* casts doubt on spending power as basis for Title IX but upholding Title IX as valid Section 5 statute), *appeal docketed*, No. 96-3511 (7th Cir. Oct. 4, 1996).

Congress further has employed its Section 5 power to ensure equal protection of the laws in the field of disability rights. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101-13 (1994), which prohibits discrimination in employment and public services, explicitly relies on Congress' Section 5 power. *See id.* at § 12101(b)(4). As with RFRA, the ADA requires government to make accommodations to generally applicable rules, *see id.* at § 12112(b)(5)(A) (defining "discrimination" as "not making reasonable accommodations" to the needs of the disabled), even though the courts might not require such accommodation. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (a disability classification is upheld as long as it rationally furthers a legitimate governmental interest); *Washington v. Davis*, 426 U.S. 229 (1976).

Similarly, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994), which prohibits discrimination against the disabled by the recipients of federal funds, was enacted pursuant to Congress' Section 5 power. *See Welch v. Texas Highways & Public Transp. Dep't*, 483 U.S. 468, 472 n.2 (1986); 42 U.S.C. § 2000d-7 (1994) (amending the Rehabilitation Act and other statutes by abrogating the States' Eleventh Amendment immunity); 132 Cong. Rec. S10876 (daily ed. Aug. 1, 1985, part II) (statement of Sen. Cranston) (invoking Section 5 power in support of section 2000d-7). The Rehabilitation Act and the ADA would be jeopardized if Congress could not enhance the protection of classes of individuals whose rights it deems especially vulnerable.

Congress also has employed its Section 5 power to prohibit the States from engaging in age discrimination in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1994). *See* 42 U.S.C. § 2000d-7 (1994) (amending the ADEA and other statutes by abrogating the States' Eleventh Amendment immunity); 132 Cong. Rec. S10876 (daily ed. Aug. 1, 1985, part II) (statement of Sen. Cranston) (invoking Section 5 power in support of section 2000d-7). Yet the Court has upheld age classifications under the Equal Protection Clause. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979). Thus, the ADEA will be jeopardized as a departure from *Murgia* and *Vance* if RFRA is invalidated simply because it departs from *Smith*.[8]

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[8] It is significant that in both *Cleburne*, where the Court addressed the equal protection rights of the disabled, and in *Vance*, where it addressed an age classification, the Court noted with approval the role that Congress had played in devising equal protection standards and remedies. *See Cleburne*, 473 U.S. at 443 (citing the Rehabilitation Act with approval); *Vance*, 440 U.S. at 97 n.12 (The ADEA "shows that the political system is working."). (continued...)

These statutes demonstrate the important role that Congress has played in enforcing equal protection rights in situations where the Courts have not thought judicial protection was necessary or constitutionally required. This Court upheld such a statute in *Fitzpatrick* as a valid exercise of Congress' Section 5 power. Striking down RFRA would be inconsistent with *Fitzpatrick* and endanger numerous statutes in which Congress has enhanced the protection afforded to vulnerable classes of persons.

C. Incorporated Constitutional Rights

It has been suggested that RFRA is invalid because Congress' power to protect incorporated rights such as the free exercise right is not coextensive with its power to protect rights such as equal protection that are contained *in haec verba* in the Fourteenth Amendment. *See* Pet. Brief at 41 n.11. However, even if RFRA is not viewed as enforcing an equal protection right, this Court explicitly has recognized the authority of Congress to enforce incorporated rights under its Section 5 power. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court upheld an attorneys' fee award against a State under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994), even though the Eighth and Fourteenth Amendments, standing alone, would not provide for a fee award. *See also United States v. Price*, 383 U.S. 787 (1966)

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[8](...continued)
Indeed, *Cleburne* began its analysis of the equal protection claim by recognizing Congress' important role in equal protection enforcement: "Section 5 of the [Fourteenth] Amendment empowers Congress to enforce this [equal protection] mandate but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." *Cleburne*, 473 U.S. at 439-40 (emphasis added).

("We have no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.'") (quoting *United States v. Williams*, 341 U.S. 70, 72 (1951). Moreover, several federal statutes demonstrate that Congress regularly has employed its Section 5 power to protect incorporated rights.

For example, Congress has protected free speech and free exercise rights in the Equal Access Act, 20 U.S.C. §§ 4071-73 (1994), which requires public secondary schools to allow equal access to students who wish to conduct meetings on school grounds regardless of the "religious, political or other content of the speech at such meetings."[9] In upholding the Act in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court described the statute as expanding the scope of a prior Court decision, *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court had held, on free speech grounds, that a public university must grant religious student groups equal access. In *Widmar*, the Court had expressed reservations about extending its ruling to younger students: "[u]niversity students are, of course, young adults [and] are less impressionable than younger students." *Id.* at 266-67 n.14. But in *Mergens*, the Court found Congress' action extending *Widmar* to younger students unremarkable, noting that "[i]n 1984, Congress extended the reasoning of *Widmar* to public secondary schools." *Mergens*,

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[9] Although this statute limits its *application* to schools that receive federal financial assistance, it disavows any attempt to use Congress' spending power as a constitutional *basis*. *See* 20 U.S.C. § 4071(e) (1994). Because the statute enforces constitutional rights against the States by providing for an individual cause of action rather than by withholding federal dollars, it must be regarded as an exercise of Congress' Section 5 power. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 243, 244 n.4 (1985).

496 U.S. at 235. In fact, the Court recognized that the statute was "enacted in part in response to two federal appellate court decisions" holding that the Establishment Clause prohibited application of *Widmar* to secondary schools. *Id.* at 239. The Equal Access Act therefore enhances the protection of First Amendment rights beyond the parameters of judicial protection, just as RFRA does.

Congress further has protected free speech rights in the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (1994), which prohibits federal or State governmental seizures of work products and documentary materials held for the purpose of public dissemination, even when the government has obtained a warrant. Although based in part upon the commerce power, the portion of this statute that applies to the States must be viewed as an exercise of Congress' Section 5 power given the First Amendment, Fourth Amendment, and due process rights it enforces against the States, *see EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) (application to States of federal statute based on the commerce power may be analyzed under Section 5 power), and given the limits of the commerce power. The Privacy Protection Act was a response to this Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), that the Constitution does not bar police officers acting pursuant to a warrant to search the offices of a newspaper forcibly and without notice. The statute thus enhances the protection of constitutional rights beyond the parameters of judicial enforcement.

Congress has employed its Section 5 power to protect incorporated rights in enacting numerous other statutes as well. *See, e.g.*, 42 U.S.C. § 290dd-2 (1994) (prohibiting state officials from using substance abuse patient records to initiate or substantiate criminal charges against a patient or to conduct any investigation of a patient); 18 U.S.C. § 2511(2)(c) (1994)

(federal wiretap law prohibiting state actions that infringe upon Fourth Amendment rights).

In sum, Congress has enacted a broad range of statutes under Section 5 that enhance the protection of individual rights. Several of these statutes are similar to RFRA in that they prohibit neutral rules with discriminatory effects; nearly all of the statutes are like RFRA in that they prohibit state actions that the Court has construed as not prohibited by the Constitution. The invalidation of RFRA therefore would jeopardize numerous federal laws protecting individual rights.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the Religious Freedom Restoration Act upheld as constitutional.

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Dated: January 10, 1997